

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 04-11408-JMD
Chapter 11

Wrenn Associates, Inc.,
Debtor

Wrenn Associates, Inc.,
Plaintiff

v.

Adv. No. 05-1057-JMD

Hexaport International Ltd.,
Defendant

*William S. Gannon, Esq.
William S. Gannon PLLC
Manchester, New Hampshire
Attorney for Debtor/Plaintiff*

*Guy E. Guarino, Esq.
Ipswich, Massachusetts
Attorney for Defendant*

MEMORANDUM OPINION

I. INTRODUCTION

Wrenn Associates, Inc. (the “Debtor”) objects to the claim of Hexaport International Ltd. (the “Defendant”) and has filed a motion seeking partial summary judgment in its favor on the sole issue of whether the Defendant’s claim should be subordinated as an untimely filed claim (Doc. No. 10) (the “SJ Motion”). This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11

Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. DISCUSSION

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, a summary judgment motion should be granted only when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” “Genuine,” in the context of Rule 56(c), “means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party.” Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1st Cir. 1993) (quoting United States v. One Parcel of Real Prop., 960 F.2d 200, 204 (1st Cir. 1992)). “Material,” in the context of Rule 56(c), means that the fact has “the potential to affect the outcome of the suit under applicable law.” Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Courts faced with a motion for summary judgment should read the record “in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party’s favor.” Maldonado-Denis v. Castillo-Rodriguez, 23 F.2d 576, 581 (1st Cir. 1994).

A. UNDISPUTED FACTS

The Debtor filed its bankruptcy petition on April 16, 2004, and did not list the Defendant as a creditor. On December 27, 2004, the Debtor provided formal notice of its bankruptcy to the Defendant by amending Schedule F to add the Defendant as a creditor holding a disputed,

unliquidated, and contingent claim. Notice of the amendment and of the February 25, 2005, bar date for filing a claim was given to “Hexaport International Ltd., c/o Guy E. Guarino, Esq.” (the “December Notice”). The Defendant did not file a proof of claim until May 20, 2005, approximately one month after this adversary proceeding was filed and three months after the deadline for filing a proof of claim. In its proof, the Defendant asserts a \$270,000.00 claim arising out of services it provided to the Debtor. The parties agree further that the Defendant became aware of the Debtor’s bankruptcy case no later than May 2004, as the Defendant’s attorney and the Debtor’s attorney had a conversation regarding an action in Massachusetts Superior Court that the Defendant commenced postpetition on April 30, 2004, against the Debtor and others.

The Defendant’s attorney states that at the time he received notice of the bankruptcy case on behalf of his client, he had not been retained to represent the Defendant in the bankruptcy but was representing the Defendant only with respect to the state court litigation. According to the Defendant’s attorney, he was retained to represent the Defendant in the bankruptcy on or about the date of the filing of the Defendant’s proof of claim. Prior to that date, the Defendant was considering consulting with a local attorney to represent its interests in the Debtor’s bankruptcy.

B. LEGAL ANALYSIS

Section 502(b)(9) of the Bankruptcy Code¹ provides that if an objection to a claim is made, the Court shall determine the amount of the claim and shall allow the claim in such amount “except to the extent that—proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) . . .” 11 U.S.C. §

¹ In this opinion the terms “Bankruptcy Code,” “section” and “§” refer to title 11 of United States Code, 11 U.S.C. § 101 et seq., as amended through April 19, 2005.

502(b)(9). The Debtor argues that the Defendant's claim is untimely and therefore should be subordinated to timely filed claims pursuant to section 726(a). The Debtor's proposed treatment of the claim would result in the Defendant receiving no funds as all timely, allowed claims will not be paid in full under the Debtor's chapter 11 plan. The Defendant objects and moves the Court to extend the time for filing its claim due to excusable neglect.

1. Subordination of Untimely Filed Claims in Chapter 11

The Debtor appears to base its contention that the Court may allow an untimely claim in a chapter 11 proceeding and subordinate the payment of such claim on the language of section 502(b)(9) which mentions section 726 and the language in section 1129(a)(7)(A)(ii) establishing the "best interests" test as one of the necessary elements for confirmation of a chapter 11 plan of reorganization. The "best interests" test requires the Court to find that each holder of an allowed claim will receive at least as much as such holder would receive in a liquidation under chapter 7 of the Bankruptcy Code. However, the Debtor cites no authority for its contention that untimely claims may be allowed but subordinated in chapter 11.

Section 726 of the Bankruptcy Code specifies how property of the bankruptcy estate is distributed to creditors in a chapter 7 proceeding. In contrast, property of the bankruptcy estate in a chapter 11 proceeding is generally distributed to creditors only in accordance with the terms of the confirmed plan of reorganization. See In re Stacy, 249 B.R. 683, 686 (Bankr. W.D. Va. 2000) (indicating that a chapter 11 plan regulates distribution of the bankruptcy estate). Federal Rule of Bankruptcy Procedure ("Rule") 3003(c)(2) requires a creditor whose claim "is not scheduled or scheduled as disputed, contingent, or unliquidated" to file a proof of claim within the time prescribed by Rule 3003(c)(3). A "creditor who fails to do so shall not be treated as a

creditor with respect to such claim for the purposes of voting and distribution.” Fed. R. Bankr. P. 3003(c)(2). In effect, Rule 3002(c)(2) creates a procedural requirement that the holder of a claim must follow in order to have an allowed claim and receive a distribution under a chapter 11 plan of reorganization. The treatment of untimely filed claims in chapter 11 proceedings is identical to the treatment of such claims in chapter 13 proceedings wherein a creditor does not have a right to receive a distribution under a confirmed plan until it holds an allowed claim. See In re Mackenzie, 314 B.R. 277, 280 (Bankr. D.N.H. 2004); 11 U.S.C. § 1325(a)(4). Nothing in Rule 3002(c)(2) grants the bankruptcy court the power to allow an untimely claim and create distribution rights for such claim outside of a confirmed plan of reorganization.² If the Defendant’s claim was not timely filed, it may not be subordinated under the provisions of section 726 because that provision of the Bankruptcy Code does not apply to the distribution of property of the bankruptcy estate in a chapter 11 proceeding.

In this case, there is no dispute that the Defendant’s claim was not timely filed. Accordingly, unless the Court, in the exercise of its equitable powers under Rules 3003(c)(3) and 9006(b)(1) extends the time for the Defendant to file its claim, the SJ Motion must be granted.

2. Excusable Neglect

Rule 3003(c)(3) permits the bankruptcy court to extend the time within which a proof of claim must be filed “for cause.” Rule 9006(b)(1) empowers a bankruptcy court to permit the late filing of a proof of claim under Rule 3003(c)(3) in chapter 11 cases if the failure to comply with

² The Court need not decide in this case whether it may confirm a chapter 11 plan of reorganization that provides for the allowance of untimely claims and distributions to the holders of such claims or accede to the request of a plan proponent for such treatment. See In re NECO Enters., Inc., 259 B.R. 507, 509 (Bankr. D.R.I. 2001). The plan of reorganization in this case contains no such provision and the plan proponent has made no such request.

an earlier deadline “was the result of excusable neglect.” Pioneer Inv. Servs. v. Brunswick Assocs. L.P., 507 U.S. 382, 382 (1993).³ Under Rule 9006(b)(1), courts are permitted, where appropriate, to accept late filings caused by “inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party’s control.” Id. at 388. In determining whether a late filing is due to excusable neglect, courts should make an equitable inquiry. Id. at 389. Courts must take into account all relevant circumstances surrounding the party’s omission, including “the danger of prejudice to the debtor, the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” Id. at 396. Once the objecting party establishes that a proof of claim in a chapter 11 proceeding has not been filed by the time fixed under Rule 3003(c)(3), the burden shifts to the party moving the court to extend the time to file the claim due to excusable neglect. Midland Cogeneration Venture L.P. v. Enron Corp. (In re Enron Corp.), 419 F.3d 115, 121 (2d Cir. 2005); In re Morelock, 151 B.R. 121, 124 (Bankr. N.D. Ohio 1992).

There is no dispute in this case that the Defendant’s proof of claim was not filed by the deadline in the December Notice. The Defendant’s opposition to the SJ Motion is in the form of a motion to enlarge the time for it to file its proof of claim based upon excusable neglect (Doc. No. 12) (the “Motion to Extend”). In order to successfully oppose the SJ Motion, the Defendant must establish that a material factual dispute exists with respect to the determination of any of the relevant circumstances material to a finding of excusable neglect or that the undisputed relevant circumstances entitle it to a finding of excusable neglect. The only response to the

³ The excusable neglect standard applies only in chapter 11 proceedings, not in chapter 13 proceedings. Aboody v. United States (In re Aboody), 223 B.R. 36, 39 (B.A.P. 1st Cir. 1998).

Motion to Extend was a motion by the Debtor to supplement the summary judgement record by adding the Defendant's responses to various requests for admissions made by the Debtor (Doc. No. 14), which was granted by the Court on October 5, 2005 (Doc. No. 17).

a. Defendant's Due Process Argument

The Defendant raises issues regarding the adequacy of service and the fact that the attorney whom the Debtor served with the December Notice was only representing the Defendant in a state court suit, not this bankruptcy proceeding. The Defendant admits that the attorney served with the December Notice by the Debtor was the same person who was representing the Defendant in a state court action against the Debtor and others. The state court action was commenced by the Defendant postpetition without knowledge of the commencement of this chapter 11 proceeding but was stayed after counsel for the Debtor notified counsel for the Defendant of the bankruptcy filing in May of 2004.

To the extent the Defendant's objection raises due process concerns because the December Notice was served only on its trial attorney in the state court action, it is unavailing. Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Notice need not be perfect but need only be reasonable based on the circumstances of the case. Zidell, Inc. v. Forsch (In re Coastal Alaska Lines, Inc.), 920 F.2d 1428, 1430 (9th Cir. 1990); In re Intaco Puerto Rico, Inc., 494 F.2d 94, 98 (1st Cir. 1974); In re DCA Dev. Corp., 489 F.2d 43, 47 (1st Cir. 1973); Vicenty v. San Miguel Sandoval (In re San Miguel Sandoval), 327 B.R. 493, 507 (B.A.P. 1st Cir. 2005); In re Anderson, 159 B.R. 830, 838 (Bankr. N.D. Ill. 1993). Creditors in

bankruptcy cases are entitled to the due process rights granted by the Fifth Amendment. Aboody v. United States (In re Aboody), 223 B.R. 36, 40 (B.A.P. 1st Cir. 1998). Notwithstanding any deficiencies in service of the December Notice, Defendant's counsel did receive the December Notice and had actual knowledge of the bankruptcy case no later than May of 2004. There is no dispute that counsel was actively representing the Defendant in a state court proceeding against the Debtor involving the very claims which form the basis of the proof of claim filed in this case. In light of this fact, the Defendant is bound by its counsel's actions or inactions. Pioneer, 507 U.S. at 396-97; Link v. Wabash R. Co., 370 U.S. 626, 633 (1962). Accordingly, in determining whether the Defendant's failure to file its proof of claim prior to the deadline in the December Notice was excusable, the proper focus is upon whether the neglect of the Defendant and its counsel was excusable. Pioneer, 507 U.S. at 397.

b. Prejudice to the Debtor

The Defendant was not originally listed by the Debtor in its schedules and, therefore, did not receive notice of the filing of the Debtor's chapter 11 petition or the original claim filing deadline of August 18, 2004. See BNC Certificate of Mailing Service filed in the main case, Bk. No. 04-11408-JMD, at Doc. No. 12. However, the Defendant had actual notice of the Debtor's bankruptcy proceeding no later than May 2004 when its state court suit against the Debtor was stayed because of the bankruptcy. After learning of the Debtor's bankruptcy proceeding, the Defendant took no action to pursue its \$270,000.00 claim. Upon receipt of the December Notice, the Defendant again took no action with respect to pursuing its claim against the Debtor. On April 26, 2005, the Debtor served the summons and complaint in this adversary proceeding

on the Defendant (Doc. No. 4). On May 20, 2005, the Defendant filed its answer to the complaint (Doc. No. 5) and its proof of claim (POC No. 217).

The Debtor did not file its initial plan of reorganization with the Court until June 14, 2005. The plan was amended twice and was confirmed by the Court on November 18, 2005. The Debtor has been ordered to submit a proposed confirmation order no later than November 30, 2005. There is nothing in the summary judgment record or the arguments of the parties that would establish that the Defendant's delay in filing its proof of claim caused any prejudice to the Debtor or any delay in formulating and confirming its plan of reorganization.

c. The Length of the Delay and the Impact on the Bankruptcy Proceeding

As discussed above, the Defendant filed its proof of claim in May 2005, one year after it had actual notice of the filing of bankruptcy in May 2004 by an entity it believed owed it \$270,000.00. The claim was filed nine months after the original filing deadline for claims of August 18, 2004, and three months after the February 25, 2005, deadline set in the December Notice. The Debtor contends that the aggregate amount of unsecured claims exclusive of the Defendant's claim is approximately \$1.05 million. Accordingly, if the Defendant's claim were allowed in full at \$270,000.00, the dividend to unsecured creditors would be reduced by about nineteen percent. However, because the Debtor's confirmed plan of reorganization is a liquidating plan, the allowance, or disallowance, of the Defendant's claim will have no impact on the Debtor, but will dilute the recovery by holders of timely filed claims.

d. Reasons for the Delay

The reasons offered by the Defendant for the delay in filing its claim involve its failure to retain a lawyer to represent it in this bankruptcy proceeding, overseas travel by its principal, and

alleged confusion between the Defendant and its counsel over the filing of a claim. The Defendant has offered nothing in the summary judgment record which suggests a lack of actual knowledge of the bankruptcy proceeding, failure to receive the December Notice or mistakes in forwarding the claim to the Court. Nothing in the summary judgment record suggests the failure to timely file a proof of claim was justified for reasons beyond the control of the Defendant. Furthermore, nothing in the summary judgment record suggests that it was a mistake on the part of Defendant's counsel that a timely proof of claim was not filed.

The summary judgment record, however, does establish that the Defendant is sophisticated in the resolution and collection of business claims as it retained counsel to bring a state court suit against the Debtor and others regarding the subject matter of its proof of claim, and it was also pursuing the retention of New Hampshire counsel to resolve other business disputes in New Hampshire. The summary judgment record also establishes that during the time between the Defendant's actual knowledge of the commencement of this bankruptcy proceeding in May 2004, the receipt of the December Notice in December 2004, and the deadline in the December Notice of February 25, 2005, the Defendant had retained counsel to pursue this claim against the Debtor and others and was pursuing other claims or resolving other business disputes through legal counsel. Nothing in the summary judgment record alleges or even suggests the Defendant was prevented from taking timely action in any other matter involving its claim in this case or any other claim or dispute.

e. Defendant's Good Faith

Nothing in the summary judgment record suggests that the Defendant was proceeding in bad faith by not timely filing its proof of claim in the Debtor's bankruptcy. Accordingly, the

Court must assume that the Defendant is proceeding in good faith in pursuing its claim in the bankruptcy court.

III. SUMMARY OF DECISION

The determination of what constitutes “excusable neglect” is unique to chapter 11 proceedings and is within the Court’s broad equitable power to balance the interests of the affected parties. Pioneer, 507 U.S. at 389. Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute “excusable neglect,” the Court’s analysis is not limited strictly to omissions caused by circumstances beyond the control of the Defendant. Id. at 392. However, all neglect cannot be excusable, or any inaction would warrant relief and the word “excusable” would be surplusage in Rule 9006(b)(1). It remains for the Court to determine what sort of neglect will be considered “excusable” taking into account all relevant circumstances surrounding a party’s omission. Id. at 395.

The lack of prejudice to the Debtor or the interests of other creditors or the estate, coupled with the absence of bad faith by the Defendant, are strong factors in favor of allowing the late filed claim. However, if the absence of prejudice and bad faith were sufficient to constitute “excusable neglect,” then creditors that choose to remain ignorant of established rules and procedures would be at no disadvantage compared to those who diligently abide by the prescribed rules and procedures. Unlike Pioneer, the summary judgment record in this case fails to allege or establish any basis for a finding that a mistake or mis-communication between the Defendant and its counsel, confusion to the Defendant or its counsel resulting from the December Notice, or circumstances beyond the control of the Defendant prevented it from filing

a timely proof of claim. The summary judgment record does establish that the Defendant is a sophisticated business that employs counsel to pursue its claims and business interest when it needs to do so.

Accordingly, the summary judgment record fails to establish any facts or disputed allegations of material fact from which the Court could find that the failure of the Defendant to file a timely proof of claim was due to “excusable neglect.”

IV. CONCLUSION

For the reasons set forth above, the Court shall enter a separate judgment granting the SJ Motion and disallowing the Defendant’s proof of claim. This opinion constitutes the Court’s findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: November 29, 2005

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge